

HOUSE BILL 2940
By Stanley

AN ACT to amend Tennessee Code Annotated, Title 29,
Chapter 3, Part 1, relative to nuisances.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 29-3-101, is amended by deleting such section in its entirety and substituting instead the following:

(a) As used herein:

(1) "Lewdness" includes all matter of lewd sexual conduct or live exhibition, and includes, but is not limited to, possession, sale or exhibition of any obscene films or plate positives:

(A) Films designed to be projected upon a screen for exhibition;

(B) Films or slides, either in negative or positive form, designed for projection on a screen for exhibition; or

(C) Computer discs or any other electronic or otherwise powered device by which an image, writing or other projections can be transferred to a medium for viewing or other use by human beings;

(2) "Nuisance" means that which is declared to be such by other statutes or the common law, and, in addition thereto, means any place in or upon which lewdness, assignation, prostitution, patronizing prostitution, unlawful sale of intoxicating liquors, unlawful sale of any regulated legend drug, narcotic or other controlled substance, unlawful gambling, any sale, exhibition or possession of any material determined to be obscene with intent to possess, to exhibit, to sell, to deliver or to distribute or to perform or cause to be performed live performances or any other matter, performances or materials in violation of §§ 39-17-901 — 39-

17-908, § 39-17-911, § 39-17-914, § 39-17-918, or §§ 39-17-1003 — 39-17-1005, quarreling, drunkenness, fighting or breaches of the peace are carried on or permitted, or any other conduct that presents a clear and present danger to public morality, public safety or public mental health or public physical health and all personal property, including cash, checks, credit cards, credit card receipts, notes or any other negotiable instruments, contents, furniture, fixtures, equipment and stock used in or in connection with the conducting and maintaining any building, the ground on which the building or place is situated, including all ground and improvements within the outer boundary lines of the real property on which the building or place is an improvement, and other real or personal property or place for any such purpose;

(3) "Person" means and includes any human being and any entity person including, but not limited to, any individual, corporation, association, partnership, company, trustee, lessee, agent or assignee; and

(4) "Place" means and includes, but is not limited to, any building, room, enclosure or vehicle, or separate part or portion thereof or the ground itself.

(b) Any person who uses, occupies, establishes or conducts a nuisance, or aids or abets therein, and the owner, agent or lessee or other persons with any rights or entitlements with respect to any interest in any such nuisance, together with the persons employed in or in control of any such nuisance by any such owner, agent or lessee, or other persons with any rights or entitlements with respect thereto is guilty of the crime of maintaining a nuisance, which shall be punished as a Class D felony, and such nuisance shall be abated as provided hereinafter.

(c) All furnishings, fixtures, equipment, instruments convertible into money, stock, in-trade and things and items of persons patronizing or employed, as independent

contractors or otherwise, or vendors used in or in connection with the maintaining or conducting of a nuisance, are subject to seizure, summarily and immediately upon detection by any law enforcement officer, and are forfeited as contraband to the state; provided, that seizure, for the possession of tangible obscene material or matter of any kind or nature, shall be in accordance with §§ 39-17-901 —39-17-908, and seizure for violations of §§ 39-17-1003-39-17-1005 shall be in accordance with §§ 39-17-1006 and 39-17-1007. Any things or items so forfeited shall be disposed of as contraband.

(d) Upon a person's conviction for promoting prostitution or patronizing prostitution, any vehicle in which such offense was committed is forfeited as contraband in accordance with any procedure conforming to the constitutional requirements articulated by the United States supreme court; provided, however, that seizure of such vehicle must be followed by a hearing, within seventy-two (72) hours after the seizure, to establish whether there is probable cause to believe the vehicle is contraband. If probable cause is established, the vehicle shall be disposed of as contraband unless all of the persons occupying or otherwise using the vehicle when it was seized are acquitted after a trial; provided, however, if the one from whom the vehicle was seized waives a preliminary hearing, in writing, the vehicle may be disposed of as contraband without further delay; provided further, the charges for promoting prostitution and/or patronizing prostitution shall be dismissed by no means other than an acquittal after trial.

SECTION 2. Tennessee Code Annotated, Section 29-3-103, is amended by deleting such section in its entirety and substituting instead the following:

(a) When a public nuisance, as defined in § 29-3-101, is kept, maintained, carried on, or exists in any county, an in rem petition may be filed in any chancery, circuit, or criminal court of such county, in the name of the state, by and upon the

relation of the respective officers or persons named in § 29-3-102, naming as the defendant's res things and items, tangible and intangible alike, that are or are alleged to be contraband and naming as respondents the person or persons keeping, maintaining, or carrying on such nuisance, and all aiders and abettors therein, and the owners, proprietors, or agents or persons or corporations in charge or control of the building or place, wherein such nuisance exists, for the purpose of having all contraband that exists because of such nuisance disposed of as contraband and for enjoining forever persons guilty of keeping, maintaining, carrying on or otherwise causing or contributing to the existence of the nuisance from ever again so causing or contributing; provided, nothing herein stated is intended to limit or restrict in any way the right or authority of any person authorized by the common law summarily to abate public nuisances that are a clear and present danger to public morality, public safety or public mental health or public physical health from summarily abating same in compliance with presently existing requirements of common law, all of which are hereby reaffirmed by the general assembly to be the persisting law of Tennessee.

(b) Any persons authorized by § 29-3-102 to abate public nuisances, including, but not limited to, the attorney general and reporter, any district attorney general, or any city or county attorney, are authorized to retain and employ private counsel to advise and represent them as counsel of record in any and all nuisance abatement efforts and proceedings; provided, payments for the services of and expenses incurred by any private counsel so retained or employed need not, but may, be compensated from the public funds and, in part or in full, may either be pro bono or be paid by private funds directly to counsel so retained or employed, and the identity of a human person or an entity person paying compensation, in part or in whole, to private counsel so retained or employed need ever be required to be publicly disclosed.

(c) Any private counsel retained or employed, as stated in subsection (b), hereby is granted exactly the same immunity from liability as the public officer retaining or employing the services of the private counsel or, in a case initiated by ten (10) citizens and freeholders, the private counsel shall have the same prosecutorial immunity as the district attorney general in the county where the case is filed.

(d) No private counsel retained or employed, as stated in subsection (b), shall provide any assistance to any district attorney general in connection with any duties or responsibilities of such district attorney general related to criminal prosecutions, but, instead, the scope of such a private counsel's retainer and employment shall be limited exclusively to civil actions to abate public nuisances either under the common law or under the statutes of Tennessee.

(e) Any persons named in § 29-3-102 may, if jurisdiction exists, initiate the petition, described in subsection (a), in federal court or, if removed to federal court, continue to prosecute claims to abate the public nuisances in federal court.

(f) If respondents appear in cases, initiated pursuant to this section or in common law, to abate public nuisances, respondents or others unsuccessfully defend against the abatement, such respondents shall suffer an in personam judgment in favor of the prevailing parties, or, in a case where the prevailing party is an officer of a governmental entity, in favor of the governmental entity, in an amount equal to reasonable fees for attorneys and the costs of prosecution incurred by the prevailing parties, trebled.

SECTION 3. Tennessee Code Annotated, Section 29-3-104, is amended by deleting such section in its entirety and substituting instead the following:

Where such petition is filed by citizens and freeholders they shall not be required to make bond and shall be immune from liability by immunity in like manner and to the same extent as judges enjoy judicial immunity and shall not be subject to the Tennessee rules of civil

procedure pertaining to pretrial discovery or required to testify in the case initiated by the petition; and no costs or damages shall be required where the proceeding is instituted by and upon the relation of the attorney general and reporter of a district attorney general or a county or a city attorney or citizens and freeholders.

SECTION 4. Tennessee Code Annotated, Section 29-3-105, is amended by deleting such section in its entirety and substituting instead the following:

(a) In such proceeding, the court, or a judge or chancellor, shall, upon the presentation of a petition therefore, alleging that the nuisance complained of exists, issue, ex parte, a temporary seizure order, for the purpose of taking what is seized in custodia legis, and injunction, enjoining and restraining the further continuance of such nuisance, and appointing persons to serve as officers and agents of the court physically to seize and to take in custodia legis any item or thing more particularly described in § 29-3-101(2) and to hold same as agent of the court until further order of the court to the contrary.

(b) The award of a temporary in custodia legis order and injunction need not be accompanied by bond if it appears to the satisfaction of the court, the judge or chancellor, by evidence in the form of a due proper verification of the petition under oath, or of affidavits, depositions, oral testimony, or otherwise, as the petitioner may elect that the allegations of such petition are true.

(c) The ex parte temporary in custodia legis order and injunction shall not be governed or controlled by the Tennessee rules of civil procedure governing and controlling injunctions or restraining orders generally; provided, all orders, temporary or permanent, seizing or making any other disposition of items and things described in § 29-3-101(2) shall be in rem orders against a res consisting of the subject items and things, and the court or chancellor issuing the ex parte temporary in custodia legis order and injunction shall order written notice effectively to be served on and published to persons who are in

possession of items and things that are taken in custodia legis and who are enjoined, which notice clearly shall state the place to appear, within seventy-two (72) hours, to be heard by the court or judge or chancellor and to present claims and evidence if said person believes the law requires that the ex parte temporary in custodia legis order or injunction should be set aside or amended; provided, unless clear and convincing evidence and unquestionable controlling law requires that the temporary ex parte in custodia legis order and injunction be set aside or modified, the court or judge or chancellor shall issue a permanent order, as more particularly described in § 29-3-103.

SECTION 5. Tennessee Code Annotated, Section 29-3-106, is amended by deleting such section in its entirety and substituting instead the following:

(a) Three (3) days' notice in writing shall be given, to any person in possession or known to have an interest in a res that is a defendant in an in rem proceeding, of the hearing required by § 29-3-105(c) of the application; and if then continued at a respondent's instance, the writ as prayed for shall be made permanent.

(b) When a temporary in custodia legis order and injunction is issued ex parte, it shall be binding upon all persons throughout the county until modified or set aside by the court, judge, or chancellor having cognizance of the case and items and things described in § 29-3-101 that are in custodia legis shall remain undisturbed by any persons, and any interference with same shall be punished as a criminal contempt of court; and any violation of any injunction, by any persons or upon any persons procurement, shall be a criminal contempt of court and, if continuing in nature, a civil contempt of court and punished in accordance with the law.

SECTION 6. This act shall take effect July 1, 2006, the public welfare requiring it.